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No. 734

Supreme Court of the United States

OCTOBER TERM 1948

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DAVID RAE PETERSON

Petitioner

v.

THE UNITED STATES OF AMERICA

Respondent

◆

Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

TO THE SUPREME COURT OF THE UNITED STATES:

David Rae Peterson petitions this Court for a writ of certiorari and shows unto the Court as follows:

1. *Opinion of the court below.*

The opinion of the Court of Appeals, affirming the judgment of conviction, is not reported. The opinion appears in the record. [*6-13*] [1]

[1] Bracketed figures appearing herein refer to pages of printed transcript of record. Bracketed figures in *italics* refer to pages of printed supplemental record.

2. *Jurisdiction.*

The jurisdiction of this Court is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court on May 7, 1934.

3. *Timeliness of this petition.*

Judgment of affirmance was rendered and entered March 7, 1949. [*6*] Time for filing this petition for writ of certiorari was extended by order of this Court to April 25, 1949. [*27*]

4. *Statutes and Regulations involved.*

Sections 3 (a), 5 (d), 10 (a) and 11 of the Selective Training and Service Act of 1940, as amended, (50 U.S.C. App. §§ 301-318) are drawn in question here, as well as Sections 615.82, 623.1, 623.2, 625.1, 625.2, 625.3, 626.1-626.14, 627.11-627.14, 629.1, 629.2 (c), 651.1-651.8, 651.10, 652.1, 652.11, 652.12 and 653.11 of the Selective Service Regulations (32 C. F. R. Supp. 601.5 *et seq.*) promulgated by the President under said Act.

5. *Questions presented.*

(1) Did the court below err in refusing to hold that the failure of the local board to give petitioner a preinduction physical examination, within ninety days prior to the date he was ordered to report, invalidated the order because it deprived him of an opportunity to exhaust his administrative remedies?

(2) Did the court below err in refusing to hold that the local board order was void, because the local board did not send up to the board of appeal a complete record in that it failed to reduce to writing the new information given by

petitioner orally upon his personal appearance before the local board?

Statement of Case

FORM OF ACTION

This criminal action was instituted in the district court by return of indictment charging petitioner with violation of the Selective Training and Service Act of 1940, as amended, and the Regulations thereunder. [1] Pursuant to stipulation, this case and the cases of Peter Niznik and Raymond Comodor (companion cases to this one now presented to this Court) were consolidated for trial before the court and a jury. [3] At the close of all the evidence, petitioner moved for a judgment of acquittal, which was renewed following the verdict. [3] The motion was overruled. [3] Petitioner was sentenced to two years and ordered committed to the custody of the Attorney General of the United States. [4]

Appeal was duly taken from the judgment of conviction to the court of appeals. [5] In due course the case was consolidated with the cases of Peter Niznik and Raymond Comodor. The cases were jointly argued, submitted and decided. The court below entered judgment of affirmance in this case.

FACTS

David Rae Peterson, following his registration with Local Board No. 515, Sodus, New York, was mailed a Selective Service Questionnaire by his local board on August 2, 1943. [121] He timely filed the questionnaire [127], claiming exemption from all training and service as a minister of religion. He stated that he customarily served as a minister and had been active as such since August 1, 1939. [125] He informed the board that he had not been

formally ordained but was ordained by Jehovah God. [125] He also showed that he was conscientiously opposed to participation in war in any form. [126] He had completed eight years of elementary school and two years of high school. [122] He gave his occupation as general farming, raising cattle and crops, having had twelve years and eight months' experience in such work. [123] His usual occupation he gave as general farming, stating that he preferred that kind of work, and that he would not consider accepting a job which would require him to move away from his home. [124] He claimed that his classification should be II-C. [126]

On August 20, 1943, he was mailed classification notice showing he had been placed in Class II-C. [127] However, while his case was pending before the local board, and prior to such II-C classification, his claim for exemption as a minister of religion was considered by the local board. [43, 129] Upon his personal appearance he informed the board members that he was a minister, regularly engaged in his ministry. He told them that he regularly and customarily taught and preached each week as a minister and explained that he did secular work on the farm to support himself, as did the Apostles Peter and Paul, while regularly carrying out his duties as a minister. [45] He informed them in detail about his participation in church meetings and his conducting Bible studies regularly each week. [45-46, 52, 53, 54-55] Upon his personal appearance, Peterson orally presented to the local board new facts and information which did not appear in the papers on file with the local board. He discussed the matter of his ministerial status for about an hour. [56] The papers on file with the local board, although showing his claim for exemption as a minister, failed to present in detail the oral proof as to the regular performance of his duties as a minister of religion. [125] Following his personal appearance, the local board, on August 20, 1943, granted Peterson an agricultural deferment by placing him in Class II-C. [127] This continued

until April 18, 1944, when the local board placed him in Class I-A. [127] Within the time required, Peterson appealed from the I-A classification, and in his statement of appeal, among other things said, "You will also please notice on my questionnaire that I am one of Jehovah's witnesses and can't take part in combatant service of any kind. I am the third generation of Jehovah's witnesses on both my mothers and fathers side." [130-132] Following a preinduction physical examination, he was informed by the local board that he had been found physically and mentally accepted for training and service by the armed forces. [127, 132]

On June 2, 1944, the local board mailed his cover sheet to the board of appeal [127], the members of which again placed Peterson in a six-months' temporary agricultural deferment on June 10, 1944. [127, 133]

Peterson was mailed Special Form for Conscientious Objector (Form 47) on June 16, 1944, which was filled out by Peterson and filed with the board on August 10, 1944. [128, 134-138] He explained in this form additionally about his training for and activity in the ministry as one of Jehovah's witnesses, and showing that he was opposed to participation in war in any form. [134-138] The local board thereupon, on August 11, 1944, placed Peterson in Class IV-E as a conscientious objector, liable for training and service in a public service camp, to do work of national importance. [128, 140]

Thereafter the cover sheet was forwarded by the local board to the board of appeal. [128, 139] On October 28, 1944, the board of appeal continued Peterson in Class IV-E, thereby denying his claim for exemption as a minister of religion. The notice of classification was mailed to Peterson on November 1, 1944. [128, 140]

The local board thereupon wrote to the State Director, enclosing DSS Form 48, informing him that Peterson's

order number had been reached. [128, 141] [2] On December 11, 1944, Peterson was assigned to do work of national importance. [142-143] On the next day, he was notified to report to work of national importance on January 1, 1945. [128, 144] Due to inclement weather, making the roads from Peterson's home impassable, the time to report was extended to January 4, 1945. [128, 145-146]

He reported at the civilian public service camp in the time and manner required by law and remained there for a period of a little more than a year. While there he requested a discharge or leave of absence, which was denied. Following this, in May 1946, he left the camp and did not return. [37, 47-48, 57-60, 152-155]

How Issues Raised

At the close of all the evidence, petitioner made his motion for judgment of acquittal on the grounds that there was a denial of procedural due process by the local board in that its members were prejudiced and failed to give a full and fair hearing, as well as refused to reduce to writing the oral testimony given by petitioner upon his personal appearance before the local board. [98-106]

Following the verdict of guilty, petitioner moved again for a judgment of acquittal. [114-115] The renewed motion for judgment of acquittal was based on the same grounds as that made at the close of the evidence before the case was submitted to the jury. [114-115]

At the close of the evidence, petitioner made motion for judgment of acquittal by which he called attention that the

[2] In the letter to the State Director, the board informed him that Peterson had received "his physical examination in May of this year." [141] In his reply to the local board, enclosing DSS Form 49 (Assignment to Work of National Importance), the State Director said, "We respectfully refer you to Section 629.2 (c) of the Selective Service Regulations in reference to pre-induction physical examination of conscientious objectors." [147] Notwithstanding this, no other pre-induction physical examination was given to Peterson.

preinduction physical examination was given more than ninety days prior to the time of his being ordered to report to camp to do work of national importance. [100]

Specifications of Error

The Court of Appeals for the Sixth Circuit erred—

(1) in holding that the local board order was not invalid because of the failure of the local board to reduce to writing oral evidence given to the local board by petitioner upon personal appearance;

(2) in holding that the local board order was not invalid because of the failure of the local board to give petitioner a preinduction physical examination within ninety days of the date the order to report for induction was issued.

Reasons Relied on for Granting Writ

The decision of the court below in this case is in conflict with the holdings in *United States* v. *Zieber*, 161 F. 2d 90 (C.A. 3d); *United States* v. *Stiles*, 169 F. 2d 455 (C.A. 3d); and *United States* v. *Garvin*, 71 F. Supp. 545 (W.D. Pa.).

There are two questions of federal administrative law that have not been, but which should be, decided by this Court. One is whether or not a draft board order is invalid if the local board fails to reduce to writing new and additional oral testimony given to the local board upon a personal appearance. In other words, does the failure of the local board to reduce oral evidence, given upon a personal appearance, to writing deprive the registrant of a full and fair hearing before the board of appeal?

The other question is whether a draft board order issued by a local board, commanding a registrant to report at a civilian public service camp, is invalid when issued more than ninety days after a preinduction physical examination.

No physical examination is given at civilian public service camps by which a registrant can be rejected. The only

way he can be rejected is through the preinduction physical examination.

The Regulations require that a preinduction physical examination be given within ninety days of the date the registrant is ordered to report.

The court below held that the order of the local board was not invalid, basing its decision upon a prior holding of that court in *James Renwick Miller* v. *United States*, 169 F. 2d 865.

Section 629.1 of the Selective Service Regulations provides that every registrant must be given a preinduction physical examination, including registrants classified as conscientious objectors. (§§ 651.1-651.8) If such registrant is found physically fit, he is then assigned by the Director of Selective Service to a designated public service camp. (§§ 651.10, 652.1, 652.2) Pursuant to such assignment, the local board issues the order to report for work of national importance. After the registrant has been given a preinduction physical examination and has been assigned to a particular camp by the Director of Selective Service, the local board then orders him to report at the local board for transportation to the public service camp. (§ 652.11) The Regulations provide that after arrival at the camp, the registrant shall be examined to ascertain whether there has been any change in his physical or mental condition. *But irrespective of the result of the physical examination given at the camp he is accepted by the camp for work of national importance.* (§ 653.11) He cannot be rejected by the camp. If a change in his condition is found, he is hospitalized. The Regulations provide that the acceptance shall be noted after the physical examination. The camp director is required to place on the form a statement that the registrant is accepted for work of national importance at the camp to which the registrant has been assigned. The statement shall specify the date and place of such acceptance and shall be signed by the camp director. (§ 653.11)

Acceptance of one classified as a conscientious objector in IV-E upon a preinduction physical examination ends the selective process, before the order to report for work of national importance issues. The case of *Dodez* v. *United States,* reviewed by the court below (157 F. 2d 637 (1946)) and reversed by this Court, 329 U.S. 338 (1946), definitely settles this question and outlines the detailed procedure of the conscientious objector in accord with the above statement. Here petitioner was in the identical position of Dodez when Dodez was ordered to report to the civilian public service camp. Dodez had completed his administrative remedies in the same manner in which the petitioner here had completed them.

It should be remembered that the certificate of fitness signed by the induction station commander and mailed out by the local board provided that the acceptability was only temporary and that the certificate of fitness was subject "to complete re-examination if presented for induction after 90 days." [189, 254]

Army Regulation 615-500, ¶ 15 (e) reads:

"*Registrants forwarded for induction.*—Registrants forwarded for induction will ordinarily have had a preinduction physical examination within 90 days and will require only a physical inspection. Registrants so forwarded, who have not been previously examined, or who have been previously examined and found not acceptable, or who have been examined and found acceptable more than 90 days previously, will be given a complete examination. The preinduction physical examination will be void after 90 days from the date of the examination shown on DSS Form No. 221." This regulation is valid with respect to the Selective Service System and embraces the preinduction physical examination required. *United States* v. *Balogh,* 160 F. 2d 999 (C.A. 2d 1947).

The army policy of not accepting a preinduction physical examination is recognized as the rule for governing the

management of and assignment to civilian public service camps of registrants classified as conscientious objectors in Class IV-E.

The New York State Headquarters of Selective Service called attention of Peterson's local board to the policy of the Selective Service System prior to the issuance of the order to report in these words: "We respectfully refer you to Section 629.2 (c) of the Selective Service Regulations in reference to pre-induction physical examination of conscientious objectors." [147]

In its letter to the local board, in the companion cases of Niznik and Comodor the Pennsylvania State Headquarters of Selective Service, in recommending that another preinduction physical examination be given to the registrants, said that "The reason for another preinduction physical examination is that 90 days have elapsed since his previous examination." [188]

The matter would have been different had Peterson been classified in I-A for army service. In that event he would have had to report to the army induction station as ordered where another preinduction physical examination would be held just prior to induction. That is not true with respect to petitioner here. So the final holding here should be just the opposite to that which was held in the case of *United States* v. *Balogh,* 160 F. 2d 999 (C.C.A. 2d 1947). The *Balogh* case was an "army" case, requiring the registrant to report for induction into the armed forces and receive the final examination just before induction. Since Balogh did not report for induction, he could not have completed his administrative remedies.

In this case, the preinduction physical examination, which ends the administrative process, as in all cases of those

destined to civilian public service camps, must be given at least 90 days before the registrant is mailed the order to report. Peterson had exhausted his administrative remedies, and it was incumbent upon the local board to give him another preinduction physical examination because more than 90 days had expired when he was ordered to report. The local board can no longer correct the mistake.

For a showing that a substantial question is presented on a failure of the local board to reduce to writing the oral evidence given by Peterson upon his personal appearance, reference is here made to the discussion of this point in the petition filed simultaneously with this petition, in the two companion cases of *Niznik* v. *United States* and *Comodor* v. *United States*. See the petition at pages 17-22.

Conclusion

For the reasons stated, your petitioner prays that this Court issue a writ of certiorari to the Court of Appeals for the Sixth Circuit directing such court to certify to this Court for review and determination on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case as numbered and entitled on the docket of said court; and that this Court reverse the judgment of said court of appeals affirming the conviction, and order a judgment of acquittal entered, as was done in the case of *United States* v. *Stiles* (169 F. 2d 455) where the court said: "The judgment of the district court will be reversed and the cause will be remanded with directions to enter a judgment of acquittal." In the alternative your petitioner prays that this Court reverse the judgment and remand the cause for a new trial consistent with this Court's

opinion; and that your petitioner be granted such other and further relief in the premises as to this Court may seem just and proper in the circumstances.

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Petitioner

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